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SUPREME COURT, U.S.

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NO. 06-704

In The Supreme Court of The United States

NICHOLAS SABO,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
To the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a statutory scheme that preserves the right of defendants to challenge the reliability of the specific testing device and procedure remove a challenge to the general reliability of an established science that is not an essential element of an offense from trial litigation?

2. Where a crime is defined as driving with an impermissible concentration of alcohol in a person's blood irrespective of actual impairment, may a person be found guilty of the offense where the State presents evidence of the prohibited concentration?

3. May a trial court exclude evidence of a speculative defense predicated on a medical condition where a defendant fails to provide any testimony that the defendant was suffering from the medical condition at the time of the test or that he even had the medical condition?

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Statement of the Case

The instant case raises two issues: first, the constitutionality of Ohio's statutory scheme that allows defendants to challenge specific breath alcohol test results in drunk driving cases but prohibits challenges to the general scientific principles and testing devices. Second, whether the trial court erred in suppressing expert testimony predicated on purely speculative opinions that were not factually supported. Because neither issue raises a substantial question under the federal Constitution, this Honorable Court should deny Petitioner's Writ of Certiorari.

Petitioner argues, "The jury was instructed that it had to believe the test was accurate and a verdict was rendered against the defendant." Petitioner's Writ of Certiorari ("PWC"), 3. This statement is inaccurate. As noted in Petitioner's brief, the jury was instructed:

> The general reliability of the breath-testing machines is not an issue in this trial. However, you, the jury, may consider any evidence

> presented regarding the defendant's specific test and the specific machine used to test him. Evidence has been admitted about the results of a test given to the defendant to establish the concentration of alcohol in the defendant's breath. You must evaluate all the evidence presented regarding the test and its accuracy.

App. 1a, Tr., pg. 450, ln. 14-22. The jury was never instructed that it had to believe the test result was accurate. Rather, it was specifically instructed to evaluate all the evidence related to the test.

Petitioner also asserts that the State of Ohio has admitted that the Gastro Esophageal Reflux Disease ("GERD") defense is tacitly true. PWC, 3. There is no evidence in the record to suggest that the State or the manufacturer of the device has ever admitted such a defense to be "true."

Finally, Petitioner misquotes the State as arguing that the State did not need to prove each element of the underlying offense beyond a reasonable doubt. PWC, 5. Specifically, Petitioner uses an out of context quote that; "Once again, [Petitioner] is seeking to place a heretofore unknown burden

upon the State requiring it to first have evidence found admissible and then requiring proof beyond a reasonable doubt that the evidence is credible." PWC, 5.

However, in context, this quote was responsive to Petitioner's assertion before the Tenth District Court of Appeals for Ohio that a BAC test result should be inadmissible unless its reliability is proven beyond a reasonable doubt. No court has ever found that evidence must meet a beyond a reasonable doubt standard before being admissible.

It has never been the State's position that it is relieved of the burden of proof at trial after a test result is admitted into evidence. Such a scheme would be repugnant to the United States and Ohio Constitutions. However, Petitioner's position that the State must prove the reliability and credibility of the breath test beyond a reasonable doubt *prior* to admission is unsupported by any law of this Court or procedural requirement of the State of Ohio.

Summary of the Argument

This Honorable Court should deny Petitioner's Writ of Certiorari because it does not present a substantial federal constitutional question. The State of Ohio has criminalized the operation of a vehicle with a prohibited blood alcohol concentration ("BAC"). These offenses are known in Ohio as "per se OVI" (formerly "OMVI") offenses because they establish a prohibited BAC regardless of whether the defendant is actually impaired by the alcohol. See, ORC 4511.19, et seq. The Supreme Court of Ohio has determined that the general scientific reliability of the tests is not subject to challenge in criminal cases. *State v. Vega*, 12 Ohio St.3d 185, 465 N.E.2d 1303 (Ohio 1984). The import of this case is that while the basic science and the testing devices are not subject to general challenge, defendants retain the right to challenge the credibility of the specific result in their case. The General Assembly has delegated the responsibility of determining the general reliability of the science and testing

devices to the Director of the Department of Health. The State of Ohio, through its Director of Health, has adopted detailed criteria for the administration of breath tests. *Vega*, 12 Ohio St.3d at 187. A test may not be admitted unless it is shown that it substantially complied with the criteria mandated by the Director of Health. *Defiance v. Kretz*, 60 Ohio St.3d 1, 3, 573 N.E.2d 32 (Ohio 1991).

However, even where a test is admitted, a defendant "may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid means of determining [BAC.]" *State v. Tanner*, 15 Ohio St.3d 1, 6, 472 N.E.2d 689 (Ohio 1984). Thus, while defendants may not challenge the tests in a general or generic fashion, they may still admit any irregularity demonstrating whether the machine was in proper working order, whether the operator of the machine properly used the machine, and whether a

particular condition of the defendant may have affected the test. *Id.*

This statutory scheme does not amount to an unconstitutional presumption of guilt. The State still bears the sole burden to prove beyond a reasonable doubt that Petitioner's BAC was above the proscribed limit. Ohio's statutory scheme merely prevents myriad redundant hearings on the general reliability of a science that the Ohio General Assembly has found to be reliable. Criminal defendants are still free to challenge the credibility of their particular test results. Therefore, this Court should deny Petitioner's Writ of Certiorari.

Additionally, the trial court correctly denied Petitioner's attempt to obfuscate the central issues of the case with speculative and unsupported evidence. This decision was consistent with this Court's long recognized deference to the right of States to provide their own rules of criminal procedure so long as those rules are not arbitrary. And

finally, Petitioner has failed to demonstrate that Ohio's statutory scheme violates any of the constitutional provisions that Petitioner nominally states have been violated. This Court should deny Petitioner's Writ of Certiorari because no substantial federal constitutional question has been raised by Petitioner.

Argument

Ohio's statutory scheme does not implicate Petitioner's federal constitutional rights, and therefore this Court should deny Petitioner's Writ of Certiorari. Petitioner has argued three primary bases for the granting of his Writ, however, none of these bases independently or cumulatively justify granting the Writ of Certiorari. First, Ohio's statutory scheme does not create an unconstitutional presumption of guilt. Second, the trial court in the instant case correctly found that Petitioner failed to support his proposed defense with competent factual evidence. And third, Petitioner's

"catch all" argument that Ohio's scheme violates various constitutional provision is without merit.

A. The Ohio OVI scheme does not create an unconstitutional presumption of guilt.

This Supreme Court of Ohio's ruling in *State v. Vega* is not in conflict with this Court's ruling in *Francis v. Franklin*, 471 US 307 (1985). In *Franklin*, this Court addressed jury instructions that specifically shifted the burden of proving the *element* of intent away from the State. *Id.*, 317 (defining unconstitutional presumptions as those that alleviate the burden of the State in proving "elements" of the offense). In his appeal to the Supreme Court of Ohio, Petitioner conceded the statutory scheme did not shift a burden of proving guilt, but rather that the instant case involved "a conclusive presumption of reliability, not of guilt." Appellant's Memorandum in Support of Jurisdiction to the Supreme Court of Ohio, 11, App. 1a. Thus, *Franklin* stands for the proposition that it is unconstitutional to have a presumption of guilt, Petitioner argued that it was unconstitutional to have

a presumption of reliability. These two issues are inapposite. It is unclear whether Petitioner is abandoning this argument and is attempting to argue that the instant case involves a presumption of guilt. If so, this Court should find that Petitioner's argument is waived for failure to raise it in the lower courts.

Further, the Sixth Circuit Court of Appeals has previously rejected the argument that Ohio's OMVI laws contain an unconstitutional presumption of guilt. *Miskel v. Karnes*, 397 F.3d 446, 457 (6th Cir. 2005). Accordingly, even if Appellant had not waived this argument, it does not present a substantial constitutional question and this Honorable Court should deny the Writ of Certiorari. Under virtually identical facts and arguments, the Sixth Circuit noted:

> The jury, however, was not instructed to presume Petitioner's guilt of the offense on the basis of the breath test. Moreover, contrary to Petitioner's assertion that *Vega* removed the issue of a breath test's reliability from the factfinder's domain, the specific machine's reliability was very much an issue at Petitioner's trial.

. . .

> Finally, the judge's instruction to the jury commits the issue of the test's reliability to the jury's judgment and plainly places the entire burden on the prosecution.

Miskel, 397 F.3d at, 456. This accords with the Supreme Court of Ohio's discussion of the issue in *Tanner*,

> The defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels. The jury may consider those specific test results, and all other relevant evidence, in ascertaining whether the state has shown beyond a reasonable doubt that the defendant has violated the statute. There is thus no presumption of guilt.

Tanner, 15 Ohio St.3d at 6. Contrary to Petitioner's assertion, Ohio's OVI laws neither create an unconstitutional presumption nor shift the burden of proof to the defendant. Ohio juries are not instructed that they must impose a finding of guilt. Indeed, the jury in *Miskel* was given a verbatim instruction in the instant case, "You must evaluate all the evidence presented regarding the test and its accuracy." App.

1a, Tr., pg. 450, ln. 21-22. Put simply, the Ohio statutory scheme does not require or order a jury to believe a test result that it is admitted into evidence. Nor does it shift the burden to criminal defendants to disprove an element. For these reasons, this Court should find that Ohio's statutory scheme does not create an unconstitutional presumption, and should deny Petitioner's Writ of Certiorari.

In order to demonstrate an unconstitutional presumption, Petitioner relates to this Court an analogy involving a weight scale. PWC, 18-20. Under this analogy, a finder of fact is told that a suspect could not have weighed more than 250 pounds. The defendant is 275 pounds, but is weighed on a scale with a maximum reading of 240 pounds, thus resulting in a weight of 240 pounds. Petitioner argues that this demonstrates the problem of not allowing an attack on the *general reliability* of a testing device.

However, this analogy is incorrect. Nothing in Petitioner's analogy would call into question the general

scientific principles of weight measurement or the ability of the scale to accurately weigh things *generally*. The challenge would be related to a specific deficiency of the device as it related to the specific subject tested. Such a challenge would be within the scope of challenges allowed in Ohio, and Petitioner would simply provide evidence to the factfinder that he weighed 275 pounds, while the maximum reading of the scale was 240 pounds. Thus, the test would be a specific challenge; precisely the type of challenge that is allowed in the State of Ohio.

Additionally, extension of Petitioner's analogy demonstrates how criminal cases would devolve into a quagmire of "scientific" hearings. For example, in drug offenses involving quantities, Petitioner's theory allowing general challenges would allow defendants the right to challenge, in essence, the laws of physics. That is, not only would criminal defendants be able to attack a particular drug measuring scale or result, but the defendant would be

allowed to attack the very science of weights and measures in every drug case. Under Petitioner's theory, a legislature would be barred from recognizing the generally accepted principles of physics behind weights and measures, and would be barred from specifically noting scientifically accepted forms and devices used in measuring weight.

This result would be patently absurd. Criminal defendants should be afforded the necessary protection of challenging the specific result in their case. However, there is no logical basis for extending to a defendant the right to challenge the general scientific principles. It would serve no valid purpose to require the State to recreate the proverbial wheel in every criminal prosecution relying upon some type of scientific evidence, particularly where the legislature has already determined that the science is generally reliable. Interpreting the Constitution in such a manner would lead to endless, needless litigation over generally accepted scientific

principles that frequently will have no relevance in the particular case in which the issue is raised.

Because the instant case does not involve a presumption of guilt as to any element of the offense charged, and because the State bore the sole burden of proof on each element charged, this Honorable Court should deny Petitioner's Writ of Certiorari.

B. Petitioner failed to support a speculative defense, and therefore the trial court correctly ruled the defense inadmissible.

Criminal defendants do not possess unfettered rights to present evidence merely because it may cause a trial jury to have doubt. Indeed, as this Court recently stated, State lawmakers "have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials." *Holmes v. South Carolina* (2006), 126 S.Ct. 727, 164 L. Ed.2d 503, 2006 US LEXIS 3534, *2-3 (emphasis added). Both the trial court and the Tenth District Court of Appeals for the State of Ohio made factual findings that Petitioner

failed to provide sufficient foundational evidence to allow Petitioner to raise a defense related to a medical condition:

> As previously noted, the trial court indicated that it excluded defendant's challenge to the accuracy of his specific test results based on a lack of evidentiary support while separately excluding the challenge to the general accuracy of the testing procedure. We cannot find that the trial court erred in this regard.
>
> . . . [D]*efense counsel at no point indicated that testimony would be offered at trial to establish that defendant experienced an episode of GERD at the time he took the breath alcohol test or that he even had the condition.* Indeed, defense counsel admitted that Dr. Staubus would testify only "in the abstract" about the possible effects of GERD on breath alcohol tests and that neither defendant nor a medical professional would testify that defendant had GERD. Thus, to the extent defense counsel's argument and the proffered testimony could be viewed as presenting a challenge to the reliability of defendant's specific test results, we find that the trial court properly excluded the testimony based on a lack of evidentiary support.

State v. Sabo, 2006-Ohio-1521, 2006 Ohio App. LEXIS 1394, *16-17 (10th Dist., Ohio, 2006) (emphasis added). Petitioner intended to present evidence that a friend of his had seen him take the non-prescription drug Zantac and

Tums. *Id.*, at *8. Petitioner, however, was unwilling to present evidence that he had GERD, and he was unwilling to call his medical doctor to testify that he had GERD.

Indeed, Petitioner conceded that Dr. Staubus' testimony was completely irrelevant to any condition Petitioner might have had. Petitioner argued:

> I'm not going to ask Dr. Staubus anything in particular about [Petitioner]. I'm not going to get him to say [Petitioner] has reflux, or anything of that nature. . . . I will ask him hypothetically, not specifically with regard to [Petitioner], but if somebody's using Zantac, if somebody is using Tums, if they're using dip, would that give you any concerns from a scientific standpoint as to the test accuracy?

App. 2a, Tr., pg. 208, ln. 24-25, pg. 209, ln. 1-8.

Thus, Petitioner's defense was not even predicated on Dr. Staubus' speculation that Petitioner might have had GERD because Petitioner conceded that Dr. Staubus' testimony was not meant to express an opinion on the probability that Petitioner had GERD. If Dr. Staubus' testimony was not

designed to express a probability that Petitioner himself had GERD, then it was wholly irrelevant to the instant case.

This Court has spoken on a defendant's failure to factually support an affirmative defense and found that where the foundation is insufficient the entire defense should be suppressed. *United States v. Bailey*, 444 U.S. 394, 416 (1980). Although it is unclear whether GERD constitutes an affirmative defense to an OVI charge, the logic underlying the *Bailey* decision applies equally. Even if believed, Petitioner's proffer would have never factually established that Petitioner had GERD or suffered from it on the night in question. It would have establish only that Petitioner took Zantac and Tums. Petitioner's expert's reluctance to relate this directly to Petitioner, and Petitioner's failure to bring forth evidence available to him to establish his medical condition were ultimately fatal to his proposed defense.

Similarly, this Court's decision in *Holmes v. South Carolina* clearly recognizes the broad latitude the General

Assembly has in adopting rules of admissibility. *Holmes*, 126 S.Ct. at 1731. The *Holmes* Court took up the specific applicat[illegible] of this principle in relation to defenses predicated on the commission of the crime by another person. In doing so, the Court noted that frequently evidence of such a defense is so "speculative or remote" that it is properly excluded by trial courts. *Holmes*, 126 S.Ct. at 1733. Thus, the Constitution recognizes that a defense may be excluded where it is too speculative or remote.

In this case, the trial court noted that in order for Petitioner to establish his defense, "There's a lot of people out there using Zantac . . . that don't have acid reflux, so I think you're taking a quantum leap to try to get in the fact that your client might have some disease that he may or may not have that we don't know." App. 2a, Tr., pg. 209, ln. 15-19. Because Petitioner's counsel offered nothing more than idle speculation regarding Petitioner's condition, the trial court stated,

> I also don't think that you're in the best position to diagnosis your client as to what he may have. . . . I'm not going to allow you to bring up anything with regard to the possibility that he may have acid reflux unless you've given [the prosecutor] some indication that that has some relevance to this case.

App. 3a, Tr., pg. 212, ln. 21-25, pg. 213, ln. 1-2. While Petitioner's counsel informed the trial court that Petitioner had been diagnosed with GERD (App. 3a, Tr., pg. 213, ln. 4-5), Petitioner was unwilling to testify on his own behalf or to call his doctor to do so.

The trial court not only found there was an insufficient foundation for Petitioner's defense, it also directed Petitioner as to what steps he could take to remedy this deficiency. The lower court noted that "If, in fact, your client had an acid reflux problem . . . then that should be testified to by someone, maybe his doctor, maybe someone else." App. 3a, Tr., pg. 204, ln. 14-17. It is unclear why Petitioner chose not to have his doctor testify or why he chose not to testify on his own behalf, but ultimately Petitioner alone bore the burden to

establish his defense. He failed to do so with his initial proffer, and despite being given a reasonable alternative method to remedy the deficiency, Petitioner chose to proceed to trial without attempting to raise his defense properly. Petitioner's argument that he was improperly denied the opportunity to raise a defense is belied by the reality that Petitioner simply abandoned his defense when he was not allowed to raise it in a purely speculative fashion.

This Honorable Court should find that the trial court below did not abuse its discretion when it prevented Petitioner from putting a purely speculative defense before the jury, particularly where the trial court offered remedial steps that Petitioner could have taken. Petitioner's failure to assert his defense in a competent fashion should not constitute an error on the part of the State or the trial court. For these reasons, this Court should deny Petitioner's Writ of Certiorari.

C. Petitioner waived any argument under *Holmes v. South Carolina*, and any such argument would not support Petitioner's claim.

Holmes v. South Carolina clearly recognizes that State lawmakers "have *broad latitude* under the Constitution to establish rules excluding evidence from criminal trials." *Holmes*, 126 S.Ct. at 1731 (emphasis added). The right of a defendant to admit evidence is only abridged by rules that infringe upon that right "and are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Id.*, at 3. This is not a new principal of law. See *Rock v. Arkansas* (1987), 483 US 44, 58, 56. This argument was not raised at trial court despite the fact that it has been embedded in federal constitutional law for two decades. Thus, although *Holmes* was recently decided, the principle of law it is based upon was well established at the time of trial. Because Petitioner did not raise the issue at trial or on appeal, this Court should find it waived.

Even if this Court considered Petitioner's *Holmes* argument, the Court should find that Petitioner has misapplied it. Petitioner has fundamentally misconstrued the trial court's ruling. Petitioner asserts to this Court that "[T]he GERD evidence is falsely perceived as being speculative not due to the nature of the GERD evidence itself, but rather because it questions the court's belief about the accuracy of the test." PCW, 25. However, there is no evidence that this occurred in the lower court. The trial court did not suppress the GERD defense because it felt the defense was meritless, it did so because Petitioner failed to lay an appropriate foundation for it. Specifically, the trial court stated, "You cannot say anything with regard to your client's condition that you don't fully intend on proving in trial." App. 4a, Tr., pg. 214, ln. 16-18.

Indeed, the trial court specifically indicated that testimony from Petitioner's doctor or anyone else that established Petitioner actually suffered from GERD would

have remedied this deficiency. App. 4a, Tr., pg. 204, ln. 14-17. It is clear that the trial court did not make a value judgment regarding the merits of the defense itself.

Petitioner's argument is, essentially, that *Holmes* allows a criminal defendant a virtually unfettered right to present any evidence—no matter how speculative or tenuous—that could lead to any possible doubt. This is not the position of the *Holmes* Court. Under *Holmes*, the only question this Court would need to answer in resolving the issue is whether the prohibition on challenging the general reliability of the breath test was "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" *Holmes*, 126 S.Ct. at 1731.

Because "[t]he defendant may still challenge the accuracy of his specific test results, although he may not challenge the general accuracy of the legislatively determined test procedure as a valid scientific means of determining blood alcohol levels," the prohibition on challenging the general reliability of the breath test is not arbitrary or

disproportionate to the purposes it serves. *Tanner*, 15 Ohio St.3d at 6.

It was for this precise reason, that the Sixth Circuit Court of Appeals rejected a similar argument challenging the *Vega* Court decision:

> We note in closing that the district court relied upon a more recent decision of the Supreme Court to deny Petitioner's claim that the trial court denied her right to present a defense. *See United States v. Scheffer* . . .. In Petitioner's case, just as in *Trombetta*, there were various effective means of challenging the accuracy and reliability of *her* breath test without putting the reliability of BAC Verifiers in general at issue.

Miskel v. Karnes (2005), 397 F.3d 446, 454 (internal citations omitted). Although *Miskel* deals with a different standard under the Anti-Terrorism and Effective Death Penalty Act, 28 USC § 2254, its analysis is still noteworthy.

The statutory and regulatory scheme in Ohio serves the valuable purpose of preventing Ohio's OVI cases from devolving into a quagmire of hearings on the general reliability of a scientifically accepted principle and carefully

considered criteria adopted by the Director of Health. The scheme is not disproportionate to the goals it is designed to serve. If the scheme attempted to prevent any attack on the reliability of the breath testing results, it would be disproportionate because it would prevent defendants from arguing that the machine had malfunctioned, that the machine had been improperly operated, or that some other factor adversely affected the machine's accuracy. However, the Ohio scheme does not do this. It preserves all specific challenges to the test result for consideration by the jury.

Additionally, the Ohio scheme cannot be considered "arbitrary." The scheme delineates specific devices and specific procedures for those devices. Indeed, it is worth noting that if the State of Ohio were to acquire a breath test result on a machine not approved by the Director of Health, the result would be inadmissible to prove a per se offense. It would be of no moment that the State could show that the device was as generally reliable as those approved by the

Director of Health. Just as general reliability of a breath testing device is immune from attack by a defendant, the State is proscribed from attempting to use the general reliability of a non-approved device as a basis for admissibility.

Ohio's OVI laws allow adequate protection to criminal defendants by allowing them to challenge specific test results. Further, they serve the logical purpose of preventing needless litigation over a generally accepted principle, and are narrowly tailored because they follow specific criteria set forward by the Director of Health. For theses reasons, the statute is not arbitrary or disproportionate, and this Court should deny Petitioner's Writ of Certiorari.

D. Ohio's statutory scheme does not violate the holdings of any of the various cases Petitioner has cited.

Petitioner has cited numerous cases from this Court as supporting Petitioner's Writ of Certiorari, however, Petitioner has not provided analysis of the issues Petitioner

claims are raised by the instant case. This Court should deny Petitioner Writ of Certiorari because none of the cases cited by Petitioner are relevant to the instant case.

1. Neither *Apprendi v. New Jersey* or *Blakely v. Washington* are relevant to the instant case.

Apprendi v. New Jersey, 530 US 466 (2000) and *Blakely v. Washington*, 542 US 296 (2004), deal with the method of proof required to increase a sentence beyond its statutory maximum. Appellant's case was submitted to a jury, and every relevant fact was found by the jury, therefore *Apprendi* and *Blakely* are of no import in the instant case. Accordingly, even if Appellant had not waived this argument, it does not present a substantial constitutional question.

2. No testimonial evidence was presented at trial and because Petitioner failed to object to the admission of any evidence based on *Crawford v. Washington*.

Crawford v. Washington, 541 US 36 (2004), deals with the admission of testimonial evidence as it relates to the

confrontation clause of the United States Constitution. Petitioner did not object to the admission of any testimonial evidence during the trial, nor was any testimonial evidence presented against him by a witness that did not testify, and thus there was no confrontation clause violation. Accordingly, even if Appellant had not waived this argument, it does not present a substantial constitutional question.

Conclusion

Ohio's statutory and regulatory scheme allows OVI defendants the right to fully and vigorously challenge the specific results and testing procedure and therefore does not violate the Constitution. Petitioner's failure to lay a competent foundation for his GERD defense is solely his responsibility, and therefore the trial court correctly denied the speculative evidence he sought to admit. For these reasons, there was no substantial federal constitutional right

implicated in the instant case, and this Honorable Court should deny the Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

"The general reliability of the breath-testing machines is not an issue in this trial. However, you, the jury, may consider any evidence presented regarding the defendant's specific machine used to test him. Evidence has been admitted about the results of a test given to the defendant to establish the concentration of alcohol in the defendant's breath. You must evaluate all the evidence presented regarding the test and its accuracy."

Tr., pg. 450, ln. 14-22

"The argument here is that there is a conclusive presumption of general reliability of the test, not of guilt."

Appellant's Memorandum in Support of Jurisdiction to the Supreme Court of Ohio, 11.

"You must evaluate all the evidence presented regarding the test and its accuracy."

Tr., pg. 450, ln. 21-22

"I'm not going to ask Dr. Staubus anything in particular about [Petitioner]. I'm not going to get him to say [Petitioner] has reflux, or anything of that nature. I'm going to ask him to explain what that is in the abstract, how it works, how it can affect the test result, without any reference to [Petitioner]. The tie-in there will be, I will ask him hypothetically, not specifically with regard to [Petitioner], but if somebody's using Zantac, if somebody is using Tums, if they are using dip, would that give you any concerns from a scientific standpoint as to the test accuracy?"
Tr., pg. 208, ln. 24-25, pg. 209, ln 1-8.

"There's a lot of people out there using Zantac, Tums, and other antacids that don't have acid reflux, so I think you're taking a quantum leap to try to get in the fact that your client might have some disease that he may or may not have that we don't know."

Tr., pg. 209, ln. 15-19

"I also don't think that you're in the best position to diagnosis your client as to what he may have. So let's get on with opening statement. I'm not going to allow you to bring up anything with regard to the possibility that he may have acid reflux unless you have given her some indication that that has some relevance to this case."

Tr., pg. 212, ln. 21-25, pg. 213, ln 1-2.

"I have, and I can answer your question directly. He, in fact, did go to the doctor finally. He was diagnosed he does have it."

Tr., pg. 213, ln. 3-5

"If, in fact, your client had an acid reflux problem that was specific to your client, that was not aware by the officer, then that should be testified to by someone, maybe his doctor, maybe someone else."

Tr., pg. 204, ln. 14-17.

"You cannot say anything with regard to your client's condition that you don't fully intend on proving in trial."
Tr., pg. 214, ln. 16-18.

"If, in fact, your client had an acid reflux problem that was specific to your client, that was not aware by the officer, then that should be testified to by someone, maybe his doctor, maybe someone else."
Tr., pg. 204, ln. 14-17.